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IN THE

Supreme Court of the United States

OCTOBER TERM, 1959

LOCAL UNIONS NOS. 189, 262, 320, 546, 547, 571 AND 638, AMALGAMATED MEAT CUTTERS AND BUTCHER WORKMEN OF NORTH AMERICA, AFL-CIO, ET AL.,
Petitioners,

v.

JEWEL TEA COMPANY, INC., *Respondent.*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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Local Unions Nos. 189, 262, 320, 546, 547, 571 and 638, Amalgamated Meat Cutters and Butcher Workmen of North America, AFL-CIO, and their officers and representatives named in the complaint (R. 1, 2, 3-4), pray that a writ of certiorari issue to review the the judgment of the United States Court of Appeals for the Seventh Circuit entered in the above-entitled case on January 11, 1960.

OPINIONS BELOW

The opinion of the Court of Appeals is not yet reported (*infra*, pp. 1a-11a). The opinion of the District Court is unreported (R. 46-51, 56-58).

JURISDICTION

The judgment of the Court of Appeals was entered on January 11, 1959 (*infra*, p. 12a). The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Where the subject matter of a claimed violation of the Sherman Antitrust Act is within the regulatory scope of the National Labor Relations Act, does exclusive primary jurisdiction reside with the National Labor Relations Board?

STATUTES INVOLVED

The pertinent provisions of the Sherman Antitrust Act (26 Stat. 209, 15 U.S.C. § 1), and of the National Labor Relations Act, as amended (61 Stat. 316, 29 U.S.C. § 151), are set forth in Appendix C (*infra*, pp. 13a-16a).

STATEMENT

Jewel Tea Company, Inc., respondent herein, filed a complaint with the United States District Court, Northern District of Illinois, Eastern Division, alleging that petitioners and others violated Sections 1 and 2 of the Sherman Antitrust Act (R. 1). Petitioners moved to dismiss the complaint upon the ground, *inter alia*, that the "alleged restraint is within the exclusive regulatory scope of the National Labor Relations Act and is therefore outside the jurisdiction of the Court" (R.

45.)[1] The District Court denied the motion but entered an order authorizing an immediate appeal, the "court being of the opinion that the orders denying defendants' motion to dismiss and motion to vacate said order involve controlling questions of law as to which there is substantial ground for difference of opinion and that an immediate appeal from these orders will materially advance the ultimate termination of the litigation . . ." (R. 58). The Court of Appeals entered an order allowing the appeal (R. 59; 28 U.S.C. § 1292(b)), and thereafter entered a judgment affirming the denial of the motion to dismiss the complaint (*infra*, p. 12a).

Petitioners are seven local labor unions and named officers and representatives of the local unions (R. 2-4). "The membership of each of these locals consists of many hundreds of butchers or meat cutters who perform substantially all of the cutting and preparation of meat in all retail meat stores in the Chicago area" (R. 3). In addition to petitioners, the complaint names as defendants the Associated Food Retailers of Greater Chicago, a not-for-profit association representing several thousand independent food stores in the Chicago area in collective bargaining, and Charles H. Bromann, secretary and treasurer of Associated (R. 4-5). Associated and Bromann were not parties to the appeal below.

[1] Before the District Court, as before the Court of Appeals, petitioners urged additional grounds for dismissal, namely, that the allegations of the complaint show on their face that: plaintiff is *in pari delicto*; it sustains no injury; the alleged restraint does not affect interstate commerce; it constitutes a reasonable regulation of trade; and the dispute is within the labor exemption of the Sherman Act (R. 45-46). These additional grounds, rejected below, are not presented in this petition; they will be put in issue by the answer and are reserved for trial should that course prove necessary.

Employment terms of butchers and meat cutters in the Chicago area are governed by two different collective bargaining agreements, one known as a "Service Contract" and applicable to "Service Meat Markets," the other known as a "Self-Service Contract" and applicable to "Self-Service Meat Markets" (R. 15, 16-17, 29, 30-31). Respondent is a party to each type of agreement (R. 12). It operates 196 retail food stores in the Chicago area (R. 2), and of the meat departments in those stores, 174 are operated as self-service markets (R. 9), leaving 22 which are operated as service markets. Respondent employs members of petitioner unions to man the meat departments (R. 2).

The service and self-service agreements control the wages, hours, and working conditions of the butchers employed by respondent and other employers in the different markets (R. 15-44). In both agreements, the employer recognizes the union as the exclusive bargaining representative "of all employees in the meat department of said Employer who process, pack, wrap, handle and sell frozen and fresh meats on the Employer's premises . . ." (R. 19, 33). With minor exceptions both agreements require that the work entailed in the preparation and sale of meat shall be performed exclusively by the meat department employees represented by petitioner unions (R. 19-20, 33-34). And both agreements identically define the distinction between a service market and a self-service market (R. 17-18, 31-32):

> *Self-Service and Service.* A self-service market is one in which fresh beef, veal, lamb, mutton or pork are available for sale on a pre-package self-service basis. It is agreed that any market which is operated on a partially service and partially self-service basis shall be classified as a self-

service market if any fresh beef, veal, lamb, mutton or pork are made available for sale on a pre-package self-service basis, even though there is also a service counter offering custom cutting for those who prefer it. Such semi-self-service market shall be considered a self-service market subject to the terms and conditions and wage scale contained in the Self-Service Contract:

"If no fresh beef, veal, lamb, mutton or pork are sold on a self-service basis, then the market is a Service Market and shall be operated in accordance with this Service Contract. It is further expressly understood and agreed that if all fresh beef, veal, lamb, mutton and pork sold by a market are handled and sold on a service basis only, the fact that a market handles and sells on a self-service basis, delicatessen and other meat products now excepted from the jurisdiction of the Union under this Service Contract shall not operate to classify such market as a self-service market; but such semi-self-service market shall nevertheless be considered a service market subject only to the wage scales, hours and other conditions provided in the Service Contract."

The agreements establish the same "Basic Workday" in both service and self-service markets (R. 22, 36):

Eight (8) hours shall constitute the basic workday, Monday through Saturday; work to begin at 9:00 a.m. and stop at 6:00 p.m., allowing one hour for lunch, said hour to begin no earlier than 11:00 a.m. nor end later than 2:00 p.m. This is to apply to all markets whether manned by one or more than one employee.

The counterpart of the "Basic Workday" is the provision in the agreements defining the "Market Operating

Hours" in both service and self-service market (R. 23-24; 38):

> Market operating hours shall be 9:00 a.m. to 6:00 p.m. Monday through Saturday, inclusive. No customer shall be served who comes into the market before or after the hours set forth above.

The heart of the complaint is its challenge to the validity of the latter provision defining "Market Operating Hours." The complaint alleges that, "Beginning at least 10 years ago and continuing thenceforth," petitioner unions, in combination with Associated, have conspired to restrict the retail sale of fresh meat in the Chicago area to the 54 hour span from 9:00 a.m. to 6:00 p.m., Monday through Saturday. (R. 9-10). The complaint avers a "widespread public demand in the Chicago area that meat be available for retail purchase at [respondent] Jewel stores during one or more evenings of the week" (R. 8), and that, but for the limitation of retail marketing hours to the daytime, respondent "would vend meats in all or most" of its 174 self-service markets "one or more evenings a week . . ." (R. 9). The complaint alleges that, in a self-service market, meat to be sold after 6:00 p.m. can be prepared and packaged by butchers before 6:00 p.m., and that the "tasks of arranging the cuts in the cases and cleaning the cases need not be performed continuously throughout store hours and can be performed by others or can be performed by butchers some hours prior to the ending of store hours" (R. 7).

The complaint alleges that "For many years past," in order to achieve the objective of confining market operating hours to the daytime, petitioner "unions, . . . conspiring together with Associated, . . . have insisted that all collective bargaining agreements entered

into between the unions and operators of retail meat markets in the Chicago area be identical, and have insisted that the bargaining between all such operators (or their representatives) and the unions be carried on simultaneously and have exercised their monopoly powers to effectuate that insistence" (R. 10-11). "For many years past," the complaint continues, petitioners and Associated "have insisted" that "contracts between defendant unions and all operators of retail meat markets contain provisions prohibiting the retail sale of meat after 6:00 p.m. and have exercise the union's monopoly powers to effectuate that insistence" (R. 11).

With specific reference to the agreements entered into in early 1958, the complaint alleges that in 1957, in anticipation of the expiration of collective bargaining agreements on October 5, 1957, petitioner unions and operators of retail meat markets, including respondent, met "for the purpose of negotiating new agreements" (R. 11); the provision pertaining to market operating hours was in issue in the negotiations (R. 11); the "unions threatened to strike and picket any operator who refused to sign a contract which banned evening sales of meats," a "strike . . . threat made with the authorization of members of the several unions . . ." (R. 11); had such a strike or picketing ensued "other unions . . . would have honored such picket lines" (R. 12); under this "compulsion" respondent entered into agreements in early 1958 containing the marketing hours provision (R. 12); and after execution of the agreements, petitioner unions made "a strike threat" to secure compliance with the provision (R. 12-13).[2]

[2] These agreements, effective October 6, 1957, were to run until October 3, 1958, and from year to year thereafter, unless terminated by written notice given not less than sixty days prior to

The relief requested by the complaint is, *inter alia* that the limitation upon marketing hours "be declared illegal, null and void," that its enforcement be enjoined, and that petitioner unions be restrained from "striking, or picketing for the purpose of restricting plaintiff's hours of operation" (R. 14).

The Court of Appeals concluded that the subject of the complaint was outside the regulatory scope of the National Labor Relations Act. It telescoped petitioners' position in two sentences (*infra*, p. 5a):

> The core of appellants' position in their motion to dismiss is that "the provisions pertaining to market operating hours and the basic work day are opposite sides of the same coin," since, as they assert, a change in one automatically affects the other. And because one side of this coin, hours of employment, is governed by the National Labor Relations Act, *ipso facto* the reverse side is also within the exclusive regulatory scope of that act.

The court then stated that the establishment of marketing hours is an "inherent" management function within the employer's "exclusive right to determine" (*infra*, p. 5a):

> Determining the needs of the public and meeting those needs are inherent proprietary rights and obligations of the employer and must be clearly distinguished from his rights and duties as master

each expiration date (R. 27-28, 44). Before rendition of the decision below, new agreements containing the marketing hours provision had been reached between petitioner unions and market operators, including respondent; these new agreements, effective October 4, 1959, run until October 7, 1961, and from year to year thereafter, unless terminated by written notice given not less than sixty days prior to each expiration date. Since rendition of the decision below, respondent has delayed execution of the agreements previously reached.

> in the master and servant relationship. Setting marketing hours is one such proprietary function which an employer has the exclusive right to determine as dictated by economic factors present within his trading area.

The court concluded that marketing hours and working hours are so unrelated to each other that a connection between the two "can hardly be argued" (*infra*, p. 7a):

> Although exercise of an employer's proprietary right to establish marketing hours may incidentally affect its employees, as will almost anything it does, it can hardly be argued that such action is a "direct frontal attack" upon or even a "remote and indirect approach" to the subject of the basic work day.

REASONS FOR GRANTING THE WRIT

Central to the question presented is accommodation of the jurisdiction of the National Labor Relations Board to administer the National Labor Relations Act with the jurisdiction of a federal district court to enforce the Sherman Antitrust Act. More specifically, where the subject matter of a claimed violation of the Sherman Act is within the regulatory scope of the National Labor Relations Act, does exclusive primary jurisdiction reside with the National Labor Relations Board?

1. Analysis begins with a showing that the subject of the complaint is within the regulatory scope of the National Labor Relations Act. In the properly limited compass of a petition analysis must necessarily be abbreviated, but even a synopsis suffices to show that the allegations of the complaint critically implicate activity protected or prohibited by the National Labor Relations Act.

(a) The complaint attacks as an antitrust violation the contractual requirement that retail marketing hours shall cease at 6:00 p.m. The exact counterpart of this limitation is the contractual requirement that the workday shall cease at 6:00 p.m. The two march abreast of each other to guarantee effective accomplishment of the butchers' wish not to work after 6:00 p.m.

Marketing hours are thus integrally related to working hours, and "hours of employment" is a subject upon which the National Labor Relations Act requires employers and unions to bargain collectively. Thus, the policy of that Act is based on "encouraging practices fundamental to the friendly adjustment of industrial disputes arising out of differences as to . . . *hours* . . ." (Sec. 1, ¶4). The status of a union as the exclusive representative of the employees empowers it to bargain "in respect to . . . *hours of employment* . . ." (Sec. 9(a)). The reciprocal obligation of employers and unions to bargain with each other (Secs. 8(a)(5), 8(b)(3)) extends explicitly to "hours" (Sec. 8(d)). The mediation facilities provided by the Government are designed to "aid and encourage employers and the representatives of their employees to reach and maintain agreements concerning . . . *hours*" (Sec. 201(b), and employers and unions are adjured to "exert every reasonable effort" to that end (Sec. 204(a)(1)).

As an essential part of working hours, marketing hours is thus within the area of activity for which collective bargaining is ordained.

(b) To escape the relevance of marketing hours to working hours, the complaint alleges that, *in a self-service market*, meat to be sold after 6:00 p.m. can be prepared and packaged by butchers before 6:00 p.m., and that the "tasks of arranging the cuts in the cases and cleaning the cases need not be performed contin-

nously throughout store hours and can be performed by others *or* can be performed by butchers some hours prior to the ending of store hours" (R. 7, emphasis supplied). Consideration of either alternative confirms the governance of the subject by the National Labor Relations Act.

(*i*). The work that the complaint asserts "can be performed by others" is butchers' work. The complaint admits that in a self-service meat department part of the work done by butchers, in addition to cutting and packaging meat, is "to place the prepared cuts in display cases and to keep the cases clean and orderly" (R. 7). The self-service contract provides that petitioner unions are the exclusive bargaining representatives of all meat department employees "who process, pack, wrap, *handle and sell* frozen and fresh meats . . ." (R. 33, emphasis supplied). Meat department employees, it further provides, "shall perform *all* cutting, preparing, fabricating, *handling,* and packaging," and they shall have "*exclusive jurisdiction* over . . . *sale* . . ." (R. 33-34, emphasis supplied).

This the complaint would satisfy the butchers' wish not to work after 6:00 p.m. by taking the work from them. But the butchers' concern is plainly twofold: *not* to work evenings and *not* to have the work taken from them. And who shall do the work is a subject of collective bargaining. The contracts here place the work exclusively within the jurisdiction of the meat department employees. To permit employees outside the meat department to do the work within it takes the work away from the meat department employees. A union may, as the National Labor Relations Board holds, strike to compel an employer to honor the work assignment embodied in the collective bargaining agree-

ment.[3] It is thus no solution to the butchers' objection to working later than 6:00 p.m. to operate the meat department after 6:00 p.m. with other than meat department employees doing the work.

(*ii*) The other alternative asserted in the complaint is that, *in a self-service market*, all the work entailed in the operation of a meat department after 6:00 p.m. "can be performed by butchers some hours prior to the ending of store hours" (R. 7). The alternative that a *self-service* meat department may be operated after 6:00 p.m. with *no* employees on duty ignores the relationship of the service to the self-service markets. Meat can be sold in a *service* market *only* when butchers are on duty. To permit meat to be sold after 6:00 p.m. in a self-service market, but to maintain marketing and working hours in the service market to 6:00 p.m., would mean, as respondent admits (R. 55), that a portion of the trade that would otherwise patronize the service market would inevitably be siphoned off to the self-service market. This would mean a loss of work for butchers employed in the service market. To prevent this—to safeguard the work of butchers in service markets—the petitioner unions would have to permit them to work evenings. This would destroy the limitation on hours of work. In short, because of the competitive position of service and self-service markets, in order to maintain the hours of work limitation and to prevent loss of work by one type of market to the other based on differences in marketing hours, it is necessary that

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[3] *National Ass'n. of Broadcast Engineers*, 105 NLRB 355, 363-365; *Radio & Television Broadcast Engineers Union*, 114 NLRB 1354, 1359; *Local No. 48, Sheet Metal Workers*, 119 NLRB 287, 291; *Local 181, International Union of Operating Engineers*, 121 NLRB 1076; *Local 153, Wood, Wire & Metal Lathers Union*, 121 NLRB 1107, 1108, 1109, n. 37.

the marketing hours be kept the same in both types of stores. And collective bargaining under the National Labor Relations Act contemplates that a valid aim for both employers and unions alike is "avoiding the competitive disadvantages resulting from nonuniform contractual terms." *National Labor Relations Board* v. *Truck Drivers Local Union No. 449*, 353 U.S. 87, 96.

Furthermore, to operate the self-service meat department after 6:00 p.m. by performing the work before 6:00 p.m. can only be done by increasing the existing pre-6:00 p.m. work load of butchers. Work load is a subject of mandatory collective bargaining.[1] Limiting market operating hours to 6:00 p.m. fulfills the petitioner unions' proper interest in not increasing the existing work load.

(c) It is thus evident upon the face of the complaint that its allegations raise matters the determination of which requires decision of questions fundamental to the National Labor Relations Act. And the face of the complaint does not exhaust the considerations relevant to the application of the doctrine of primary jurisdiction. As this Court has explained (*United States Navigation Co.* v. *Cunard S. S. Co.*, 284 U.S. 474, 487):

> In the first place, while the allegations of the bill must be taken as true upon the motion to dismiss, they still are subject to challenge by pleading and proof if the motion be denied. We cannot assume that, in a proceeding before the board in which the whole case would be open, similar allegations will not be denied or met by countervailing affirmative averments. . . . And whatever may be the form of the agreement, and whether it be lawful

[1] *Beacon Piece Dyeing & Finishing Co.*, 121 NLRB 953; *Woodside Cotton Mills Co.*, 21 NLRB 42, 54-55.

or unlawful upon its face, Congress undoubtedly intended that the board should possess the authority primarily to hear and adjudge the matter."

Upon a trial, among other things, petitioners would show that in the Chicago area limitations upon retail hours in the marketing of meat have been included in collective bargaining agreements since 1920, and that respondent has been a party to such agreements since about 1928; that the limitation has its origin in the desire of butchers to shorten the working day and to keep from working evening hours, and that it continues for that purpose; that it is not possible to operate a meat department evenings without butchers on duty, and that an extension of marketing hours inescapably embraces an extension of working hours; and that in the 1957-1958 negotiations respondent's request for evening marketing hours was explicitly coupled with a request that butchers work evenings.

(d) Marketing hours is thus a mandatory subject of collective bargaining because of its relationship to working hours and protection of work. As such, the inclusion in a collective bargaining agreement of a provision regulating marketing hours "is an issue for determination across the bargaining table" (*National Labor Relations Board* v. *American National Ins. Co.*, 343 U.S. 395, 409); and the Government is not to "sit in judgment upon the substantive terms of collective bargaining agreements" (*id.* at 404). "Within the area in which collective bargaining was required, . . . the parties . . . are to work out their agreement themselves." *Local 24, International Brotherhood of Teamsters* v. *Oliver*, 358 U.S. 283, 295. "The Act does not fix and does not authorize anyone to fix generally applicable standards of working conditions." *Terminal*

Railroad Ass'n. v *Brotherhood of Railroad Trainmen*, 318 U.S. 1, 6. Nor is it the office of the antitrust laws to excise from the area of collective bargaining subjects which the National Labor Relations Act commits to that area.

But even if marketing hours is not a mandatory subject of collective bargaining, it is nonetheless within the regulatory scope of the National Labor Relations Act. The complaint alleges that petitioners "have insisted" upon the marketing hours provision in collective bargaining (R. 11). To insist upon a nonmandatory subject is to refuse to bargain, for "it is lawful to insist upon matters within the scope of mandatory bargaining *and unlawful to insist upon matters without*, . . ." *National Labor Relations Board* v. *Wooster Division of Borg-Warner Corp.*, 356 U.S. 342, 349 (emphasis supplied). The order which ensues would require cessation from that insistence (*Wooster Division of Borg-Warner Corp.*, 113 NLRB 1288, 1297, affirmed, 356 U.S. 342), as well as from auxiliary conduct designed to effectuate it (*International Longshoremen's Association*, 118 NLRB 1481, 1483, remanded, 45 LRRM 2551 (C.A.D.C., Jan. 28, 1960)).

And whether or not marketing hours is a mandatory or permissive subject of collective bargaining requires initial determination by the National Labor Relations Board. The complaint prays that "the restriction on hours . . . be declared illegal, null and void, and that defendants be enjoined from enforcing said restriction in [the collective bargaining agreements] . . . or any other rule, contract, or restriction having a similar effect or purpose" (R. 14). Were the Board to find that marketing hours is a mandatory subject of negotiation, it would require petitioners and respondent to

bargain with each other on the subject should either refuse to do so. Thus the complaint asks the District Court to enjoin as a violation of the Sherman Act what the Board may compel as a duty under the National Labor Relations Act. This is an impossibility. A principal function of the doctrine of primary jurisdiction is to avoid just such "uncoordinated and conflicting requirements." 3 Davis, Admin. Law Treatise, § 19.01, p. 5 (1958). "Otherwise, we might have the spectacle of courts throughout the country enjoining practices as violations of the antitrust laws even though the agency specifically authorized to deal with them has determined or may decide, subject to judicial review, that such practices serve the interests" of the regulatory policy committed to the agency's administration. *S.S.W., Inc.* v. *Air Transport Ass'n. of America*, 191 F. 2d 658, 663 (C.A.D.C.). See also, von Mehren, *The Antitrust Laws And Regulated Industries: The Doctrine of Primary Jurisdiction*, 67 Harv. L. Rev. 929, 965-966 (1954).

(e) The inclusion of the subject matter of the complaint within the regulatory scope of the National Labor Relations Act is emphasized by the means asserted to effectuate the alleged conspiracy. The complaint avers that petitioners "have insisted that all collective bargaining agreements entered into between the unions and operators of retail meat markets in the Chicago area be identical, and have insisted that the bargaining between all such operators (or their representatives) and the unions be carried on simultaneously and have exercised their monopoly powers to effectuate that insistence" (R. 10-11). These alleged means graphically illustrate the deep embedment of the whole of the subject within the regulatory scope of the National Labor Relations Act.

First, to assert that the petitioner unions "exercised their monopoly powers" is simply an epithetical advertence to the right to strike. But the "Strike threat . . ., together with the occasional strike itself, is the force depended up to facilitate arriving at satisfactory settlements.'" *National Labor Relations Board* v. *Lion Oil Co.*, 352 U.S. 282, 291.

Second, insistence that "all collective bargaining agreements . . . be identical" is insistence upon nothing but uniformity in labor standards, a traditional and legitimate labor objective. Indeed, "avoiding the competitive disadvantages resulting from nonuniform contractual terms" is so valid an aim that employers may lawfully engage in a "temporary lockout to preserve the multi-employer bargaining basis from the disintegration threatened by the Union's strike action" against one employer alone. *National Labor Relations Board* v. *Truck Drivers Local Union No. 449*, 353 U.S. 87, 96, 97.

Third, the allegation of insistence upon simultaneous negotiation among petitioners and all operators of meat markets ultimately presents the question of the appropriate structure for bargaining. Employers and unions have the statutory bargaining obligation "to meet at reasonable times and confer in good faith . . ." (Secs. 8(d), 8(b)(3)). Insistence upon simultaneous negotiation may well fulfill the duty "to meet at reasonable times and confer in good faith" if the respondent is part of a multi-employer bargaining group; it may well not do so if respondent is bargaining on a single-employer basis. Whether it is one or the other basis depends upon whether the structure for bargaining is the single-employer unit or multi-employer unit, a

question committed to the Board's determination. See *Retail Associates, Inc.*, 120 NLRB 388.

2. Since the subject matter of the complaint is within the regulatory scope of the National Labor Relations Act, the same rationale which preempts state action compels application of the doctrine of primary jurisdiction.

Had the instant complaint been filed in a state court alleging a violation of a state antitrust statute, dismissal of the complaint in deference to the exclusive jurisdiction of the National Labor Relations Board would be required. That is the teaching of this Court's decisions last term in *San Diego Building Trades Council* v. *Garmon*, 359 U.S. 236, and *Local 24, International Brotherhood of Teamsters* v. *Oliver*, 358 U.S. 283. *Garmon* teaches that where activity is *arguably* subject to the protection of Section 7 or the prohibition of Section 8 of the National Labor Relations Act, exclusive competence to decide the question resides with the National Labor Relations Board. *Oliver* teaches that state prohibition is excluded "'even though that with which the federal law is concerned as a matter of labor relations be related by the State to the more inclusive area of restraint of trade'" (358 U.S. at 297).

The rationale which requires a state court to defer to the jurisdiction of the National Labor Relations Board applies equally to a federal court. *Garmon* itself states that "When an activity is arguably subject to § 7 or § 8 of the Act, the States *as well as the federal courts* must defer to the exclusive competence of the National Labor Relations Board . . ." (359 U.S. at 245, emphasis supplied). This has long been settled; indeed, the original displacement of the state courts was

based on the fact that not even a federal court could act. "The same reasoning which prohibits federal courts from intervening in such cases, except by way of review or on application of the federal Board, precludes state courts from doing so. * * * And the reasons for excluding state administrative bodies from assuming control of matters expressly placed within the competence of the federal Board also exclude state courts from like action." *Garner* v. *Teamsters Union*, 346 U.S. 485, 491. See also, *Weber* v. *Anheuser Busch, Inc.*, 348 U.S. 468, 479 and n. 8; *Acme Freight Lines, Inc.* v. *Clayton*, 228 F. 2d 385, 389 (C.A. 2), cert. denied, 351 U.S. 950. For action by a federal court, no less than by any other tribunal, creates "potential conflict of two law-enforcing authorities, with the disharmonies inherent in two systems, . . . of inconsistent standards of substantive law and differing remedial schemes" (359 U.S. at 242).

Nor does it make a difference that the source of law invoked in the federal court is the Sherman Antitrust Act. The provision of the collective bargaining agreement at issue in *Oliver* pertained to minimum equipment rental of leased vehicles. The Court found the provision to be a mandatory subject of collective bargaining because it was designed to maintain the "basic wage structure established by the collective bargaining agreement" and to prevent "progressive curtailment of jobs" (358 U.S. at 293-294). While the provision in *Oliver* was attacked via *state* antitrust law, whereas the provision here is attacked via *federal* antitrust law, the difference in the source of the attack cannot alter the containment of the subject within the scope of mandatory collective bargaining. Whether it is within this scope depends solely upon whether it "is a sub-

ject within the phrase 'wages, hours, and other terms and conditions of employment' which defines mandatory bargaining." *National Labor Relations Board* v. *Wooster Division of Borg-Warner Corp.*, 356 U.S. 342, 349. It is evident that the minimum equipment rental provision in *Oliver* would not be any the less a subject of mandatory collective bargaining had the suit been instituted in a federal district court based on the federal antitrust laws rather than in an Ohio court based on the state antitrust laws. And the same must be true of the retail marketing hours provision in this case.

To be sure, in *Oliver*, the Court stated that "federal law sets some outside limits (not contended to be exceeded here) on what their [the union's and employer's] agreement may provide, see *Allen Bradley Co.* v. *Local Union*, 325 U.S. 797; cf. *United States* v. *Employing Plasterers Ass'n.*, 347 U.S. 186, 190." 358 U.S. at 296. But the condemned aspects of the agreements in *Allen Bradley* and *Plasterers* pertained to compacts among business men to exclude competitors from the market. These were trade restraints effectuated by a combination of business men, aided by a union, in which the activity did not directly serve a collective bargaining objective and was related to wages and work *only* in the sense that the greater profits realized because of the activity enabled the employers to pay better wages and provide more work. The National Labor Relations Act does not require bargaining on a proposal to exclude competitors from the market or to fix prices on the theory that diminution in competition will make the companies more prosperous and thus enable them to increase wages. But in this case, as in *Oliver*, the agreement pertains directly to a collective bargaining subject, and here, as there, the National Labor Rela-

tions Act controls. "At the least the subject of the agreement is surely arguably within the regulatory scope of the National Labor Relations Act and hence the National Labor Relations Board alone is empowered to determine the question in the first instance. Prior resort to the Board is especially appropriate because the Sherman Act is aimed primarily at combinations having commercial objectives and is applied only to a very limited extent to organizations, like labor unions, which normally have other objectives." *Klor's, Inc.* v. *Broadway-Hale Stores, Inc.*, 359 U.S. 207, 212, n. 7.

The principles underlying the preemption of state action thus control here as well. As has been observed, "even though the thinking about" preemption in the context of the National Labor Relations Act "has focused upon the problem of federalism, the problem still continues to be one of primary jurisdiction. When relief is sought in a federal court instead of in a state court, the problem of whether the court should defer to the Board is much the same." 3 Davis, Admin. Law Treatise, § 19.05, p. 23 (1958). "The principal reason behind the doctrine [of primary jurisdiction] is recognition of the need for orderly and sensible coordination of the work of agencies and of courts." *Id.* at 5. ". . . [B]efore the particular agency has defined the particular regulatory policy in the particular case, the courts are not well equipped to make initial decisions involving accommodation of the antitrust policy to the regulatory policy." *Id.* at 25. And so, "A court should not act without knowing the agency's specific regulatory policy with respect to the particular problem in the particular circumstances." *Id.* at 27.

But the court below disdained "taking into account what the agency has to offer. . . ." *Id.* at 5. It concluded that marketing hours and working hours are so unrelated that a connection between the two "can hardly be argued . . ." (*infra*, p. 7a). Solely upon the basis of this bare *ipse dixit* it not only bypassed the National Labor Relations Board but decided an important question of the scope and specific application of the National Labor Relations Act altogether abstractly. Without any exploration of what the complaint shows on its face, much less any consideration of what a factual inquiry into the particular circumstances would independently disclose, the court below removed marketing hours from the bargaining table by enunciating the dogma that "an employer has the exclusive right to determine" marketing hours as an exercise of "inherent proprietary rights" (*infra*, p. 5a).[5] Such "abstract exposition" uninformed by the agency's judgment is the antithesis of the doctrine of primary jurisdiction and a renunciation of its values. *Federal Maritime Board* v. *Isbrandtsen Co.*, 356 U.S. 481, 499. As with the Civil Aeronautics Act, so with the National Labor Relations Act, "proceedings before the Board will result in a determination by it of the extent of its jurisdiction over the subject matter. In addition, they will produce a record, findings of fact and conclusions of law as to whether the specific practices complained of are legal or illegal under the . . . Act—all of which

[5] The same absolutist dichotomy between things managerial and things labor—highlighted by the anachronistic advertence to the employer's role "as master in the master and servant relationship" (*infra*, p. 5a)—is reflected in the decision of the court below in *Order of Railroad Telegraphers* v. *Chicago and North Western Ry. Co.*, 264 F. 2d 254, certiorari granted, No. 100, October Term 1959, Oct. 12, 1959.

will be subject to judicial review under that Act." *S.S.W., Inc.* v. *Air Transport Ass'n. of America*, 191 F. 2d 658, 664 (C.A.D.C.). Without such prior recourse responsible accommodation of antitrust policy with regulatory policy cannot be achieved.

3. To decline or defer jurisdiction of an alleged violation of the Sherman Antitrust Act in favor of an agency's determination of cognate questions under a regulatory statute is of course not new doctrine. Recourse to the agency has been required under the Interstate Commerce Act,[6] the Shipping Act,[7] and the Civil Aeronautics Act.[8] And while it was not required under the Communications Act in its regulation of the television industry,[9] this Court stressed the applicability of the doctrine of primary jurisdiction to situations in which "administrative uniformity" and "administrative experience" were requisite.[10] These considerations are decisive here. Under the National Labor Relations Act, "Congress has expressed its judgment in favor of uniformity." (*Guss* v. *Utah Labor Relations Board*, 353 U.S. 1, 10-11), and the "unifying consideration" of this Court's "decisions has been regard to the fact that Congress has entrusted administration of the labor policy for the Nation to a centralized administrative

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[6] *United States* v. *P. & R. Ry. & Nav. Co.*, 228 U.S. 87, 406-408; *Keogh* v. *Chi. & N.W. Ry. Co.*, 260 U.S. 156; cf., *United States* v. *West. P. R.R. Co.*, 352 U.S. 59.

[7] *United States Navigation Co.* v. *Cunard S. S. Co.*, 284 U.S. 570; *Far East Conference* v. *United States*, 342 U.S. 570; cf. *Federal Maritime Board* v. *Isbrandtsen Co.*, 356 U.S. 481, 496-500.

[8] *S.S.W., Inc.* v. *Air Transport Ass'n. of America*, 191 F. 2d 658 (C.A.D.C.).

[9] *United States* v. *Radio Corp. of Amer.*, 358 U.S. 334.

[10] *Id.* at 347-348.

agency, armed with its own procedures, and equipped with its specialized knowledge and cumulative experience" (*San Diego Building Trades Council* v. *Garmon*, 359 U.S. 236, 242). Whether the doctrine of primary jurisdiction should apply to claimed violations of the Sherman Antitrust Act which are within the regulatory scope of the National Labor Relations Act is a question of fundamental importance which this Court should decide.

CONCLUSION

For the reasons stated this petition for a writ of certiorari should be granted.

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